

**BEFORE THE STATE PERSONNEL BOARD
IN THE MATTER OF**

LAPOINTE HOLSTON,)	
)	
Appellant,)	
)	
v.)	CASE NO. 21-24-RCS
)	
ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD,)	
)	
Appellee.)	

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

This recommended order arises from an employment termination action by the Alabama Alcoholic Beverage Control Board (hereinafter "ABC"). ABC terminated the employment of LaPointe Holston (hereinafter "Holston" or "the employee") after he allegedly stole money from a customer. The evidence presented by ABC during the hearing showed Holston violated State Personnel Board Rules and Policies as well as ABC Departmental Rules and Policies and its decision to dismiss Holston should be upheld by the State Personnel Board.

A hearing was held on October 14, 2021, at the State Personnel Department in Montgomery, Alabama. Kevin S. Holden, Esq., appeared as counsel on behalf of ABC. Holston proceeded *Pro se*.

At the beginning of the hearing, ABC introduced into evidence exhibits consecutively marked as ABC's Exhibits 1 - 8. Holston did not introduce

any additional exhibits. The undersigned informed the parties that Holston's personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

ABC called as witnesses:

- (1) Gawanda Goldsmith, ABC Store Manager II; and
- (2) Nicki Watson, ABC Store District Supervisor.

Holston testified on his own behalf.

I. PROCEDURAL HISTORY AND CHARGES

ABC hired Holston in November 2018 as an "ABC Sales Associate I."

Holston remained in that classification until his dismissal on August 19, 2021.

See August 18, 2021, dismissal letter ("dismissal letter") signed by ABC Administrator H. M. Gipson.¹

In the dismissal letter, Gipson stated:

In correspondence dated July 7, 2021, you were notified of my receipt of a recommendation that you be terminated as an ABC Sales Associate I (11706) assigned to District 10 in Montgomery (51) County. The specific violations of ABC Board Personnel Policy were outlined on the initial letter of recommendation from your reporting official(s) dated July 6, 2021. To allow you an opportunity to respond to the allegation(s), a pre-termination conference was scheduled as outlined:

...

With your participation in the conference, Mr. Bob Martin (ABC Board Attorney), served as the objective reviewing officer of the

¹ See ABC's Exhibit 3.

information available. Mr. Peacock provided the recommendation as outlined in the attached pages.

Considering all available information, I agree with the initial recommendation and order your dismissal from state service based on your violation of the previously stated ABC Board Personnel Policies and Procedures. Your termination from state service is considered effective immediately.

...

In ABC's short statement of facts, they included a charge under ABC 4-10-.02 General Work Rules (1) Minor violations, (e) Failure to perform job properly, and (n) Violations of specific department rules; and (2) Serious violations, (c) Theft, and (j) Serious violation of any other Agency Rule.²

Holston timely appealed his dismissal to the Alabama State Personnel Board, pursuant to *Ala. Code 1975*, § 36-26-27(a). On September 8, 2021, a pre-hearing conference call was held. The parties' selected October 7, 2021 for the hearing date. On October 1, 2021, the undersigned continued the hearing for one week based upon a request from Holston. On October 14, 2021, the undersigned conducted a *de novo* hearing ("the hearing"), at which ore tenus and documentary evidence was received.

² See ALJ file.

II. FACTUAL BACKGROUND

Having reviewed the documentary evidence and having heard the testimony presented at the hearing and having observed the witnesses' demeanor and assessed their credibility, the undersigned finds the greater weight of the evidence supports the following findings of facts.³

A. Employee's Personnel File⁴

Holston's annual performance appraisals ("APA") while at ABC reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
03/21	0.1	Does Not Meet Standards
03/20	20.0	Meets Standards
04/19 ⁵	27.1	Exceeds Standards

Holston's prior disciplinary history at ABC includes the following disciplinary actions (in reverse chronological order):

- 3-day Suspension from June 10, 2020, through June 12, 2020, Tardiness.
- Written Reprimand on February 27, 2020, for Tardiness.
- Warning on November 21, 2019, for Tardiness.

³ All references to exhibits and testimony are intended to assist the State Personnel Board in considering this recommended order and are not necessarily the exclusive sources for such factual findings.

⁴ See generally SPB Rules 670-X-18-.02(5) and 670-X-19-.01(1)(b) (employee's work record, including performance and disciplinary history, and length of service considered in dismissing employee).

⁵ Holston's Final Probationary Performance Appraisal.

- Counseling on September 11, 2019, for Tardiness.
- Counseling on July 31, 2019, for inattention to job and unauthorized use of the cell phone.

B. ABC Policies/Procedures Forming the Basis of the Charges

ABC Personnel Work Rules, Chapter ABC-4-10-.02 provides, in part:

In addition to any special rules implemented by the various Division Heads for the guidance of their employees, the following standard general work rules shall apply to all Agency employees. The lists are not all-inclusive and there is no implication that discipline may not be imposed for other sufficient reasons. These rules are consistent with those of the Rules of the State Personnel Board, as amended, Chapter 670-X-19.

...

(1) Minor violations – violations that normally result in disciplinary actions of increasing severity:

...

(e) Failure to perform job properly.

...

(n) Violations of specific department rules.

(2) Serious violations – More serious violations that may result in suspension or termination on the first offense, considering work record and length of service.

...

(c) Theft or unauthorized possession of Agency property.

...

(j) Serious violation of any other Agency rule.

...

ABC-4-10-.03 EMPLOYEE STANDARDS OF CONDUCT, states:

- (1) Professional Behavior and Conduct – Professional conduct requires compliance with Agency policies and procedures, the Rules of the State Personnel Board, Alabama Ethics Laws, and other standards of conduct which members of the public expect of State employees. Agency employees are expected to demonstrate high standards of personal integrity and must conduct themselves in a professional manner.

...

ABC-4-1-.02 EMPLOYEE RIGHTS AND RESPONSIBILITIES,

states:

...

- (2) Employment CAN be terminated for cause. Employees are required to earn the protection of the system by following work rules, fulfilling job responsibilities, and demonstrating acceptable levels of conduct. Some examples of rule violations for which employees can be terminated from State service include, but are not limited to:

...

Fraud, Theft.

...

C. Facts Forming the Basis of Dismissal

On June 30, 2021, Holston was working behind the register at an ABC Store. An elderly customer walked into the store with the intent to purchase two bottles of alcohol, a fifth of Patron Silver and a bottle of Don Julio Tequila. The store did not have Don Julio in stock, so the customer approached Holston with a bottle of Patron Silver. The customer dropped two bills on the counter in front of Holston, and then after a slight pause, he

dropped a third bill on the counter. In total, the customer placed \$90.00 on the counter, one \$50 bill and two \$20 bills. The bottle of Patron Silver cost approximately \$62 and some change. Holston collected all three bills off the counter, placed them on the keyboard of the register and then opened the cash drawer on the register and gave the customer some change. After the customer collected his change and bottle of Patron Silver he walked out the door of the store. Holston placed the \$50 bill under the cash drawer in the register since it was a bill larger than a \$20, placed one \$20 bill in the area of the cash drawer reserved for \$20 bills and then rolled up the second \$20 bill and placed it in a far-left corner of the cash drawer. Holston then closed the cash drawer.⁶

A short time later, Holston opened the cash register while he helped another customer and took the \$20 bill out of the cash register and placed the \$20 in his left front pants pocket.⁷ After Holston placed the \$20 in his pocket, the customer called the store and spoke with Store Manager Gawanda Goldsmith ("Goldsmith") about his missing \$20. Goldsmith asked Holston about it. Initially, Holston told Goldsmith the customer only gave him \$70 to pay for the Patron Silver. Goldsmith reviewed the video footage and saw Holston place the \$20 in his pants pocket. Goldsmith spoke with Holston a

⁶ See ABC Exhibit 6, video surveillance called "Putting in register."

⁷ See ABC Exhibit 7, video surveillance called "Putting in pocket."

second time about the missing \$20 and Holston admitted he took the \$20 and laughed while he told her “His [meaning customer’s] bad.”⁸ Goldsmith replied to Holston, “No, your bad.” There was also video evidence that showed Holston tried to cover up taking the \$20 by placing the \$20 back into the cash drawer after Goldsmith spoke with him immediately after the customer called the store.⁹ Goldsmith testified she reviewed the video surveillance again and then contacted her supervisor, Nicki Watson (“Watson”).

Watson testified she reviewed the video surveillance footage, spoke with Goldsmith and drafted the charges against Holston, recommending his dismissal from state service. Watson captured the video footage and preserved it for further use.

Holston testified on his own behalf. Holston testified he did not laugh when he spoke with Goldsmith. Holston testified he was accepting responsibility saying, “my bad.” Holston testified he was under the impression the customer left him a tip. Holston testified he realized employees of ABC are not supposed to accept tips or gifts, but he alleged it was up to an employee’s supervisor. Holston testified tips are common and

⁸ Testimony of Goldsmith.

⁹ See ABC Exhibit 8, video surveillance called “Putting back in register after call from customer.”

it was routine to accept them. Holston also disputed his dismissal claiming he was told by District Manager Roger Williams that if ABC does not take action against him within 10 days of the incident, it will be expunged from his record.

ABC Rule 7-24-.01 Gifts/Ethics, states, “(4) Soliciting and/or accepting gratuities, gifts, and/or favors from customers is not allowed under any circumstance.”

ABC Rule 7-24-.02 Tipping, states, “All ABC beverage store employees are prohibited from soliciting and/or accepting tips or gratuities of any type from customers and/or other individuals contacted in the course of performing their jobs with the ABC Board. This includes the hanging of stockings in the store sales area at Christmas and pinning money to your shirt on a birthday to promote gifts, etc.”

III. ISSUE

Did ABC produce sufficient evidence to warrant Holston’s dismissal?

IV. DISCUSSION

The purpose of the administrative appeal is to determine if the termination of the employee’s employment is warranted and supported by the evidence. *Kucera v. Ballard*, 485 So.2d 345 (Ala.Civ.App. 1986); *Thompson v. Alabama Dept. of Mental Health*, 477 So.2d 427 (Ala.Civ.App. 1985); *Roberson v. Personnel Bd. of the State of Alabama*, 390 So.2d 658

(Ala.Civ.App. 1980). In *Earl v. State Personnel Board*, 948 So.2d 549

(Ala.Civ.App. 2006), the Alabama Court of Civil Appeals reiterated:

“[D]ismissal by an appointing authority ... is reviewable by the personnel board only to determine if the reasons stated for the dismissal are sustained by the evidence presented at the hearing.”

Id. at 559, quoting *Johnston v. State Personnel Bd.*, 447 So.2d 752, 755 (Ala.Civ. App. 1983).¹⁰

In determining whether an employee’s dismissal is warranted, the departmental agency bears the burden of proving the charges warrant termination by a “preponderance of the evidence.” The law is well settled that a “preponderance of the evidence” standard requires a showing of a *probability* that the employee is guilty of the acts as charged. Thus, there must be more than a mere possibility or one possibility among others that the facts support the disciplinary action at issue. The evidence must establish that *more probably than not*, the employee performed, or failed to properly perform, as charged. See *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S.Ct. 1953, 138 L.Ed. 2d 327 (1997), holding that a “significant

¹⁰ The Alabama Court of Civil Appeals went further to hold: “both this court and the circuit court must take the administrative agency’s order as ‘prima facie just and reasonable’ and neither this court nor the circuit court may ‘substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.’” *Id.* at 559, citing Ala., Code 1975, § 41-22-20 (k); *State Dept. of Human Res. v. Gilbert*, 681 So.2d 560, 562 (Ala.Civ.App. 1995).

possibility” falls far short of the APA’s preponderance of the evidence standard. *See also Wright v. State of Tex.*, 533 F.2d 185 (5th Cir. 1976).¹¹

An administrative agency must act within its constitutional or statutory powers, supporting its decision with substantial evidence. “Substantial evidence has been defined as such ‘relevant evidence as a reasonable mind might accept as adequate to support a conclusion,’ and it must be ‘more than a scintilla and must do more than create a suspicion of the existence of a fact to be established.’” *Alabama Alcoholic Beverage Control Bd. v. Tyson*, 500 So.2d 1124, 1125 (Ala. Civ. App. 1986).

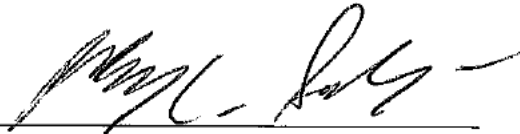
In the present case, the video surveillance clearly showed Holston steal \$20 from a customer. When confronted by his supervisor, Holston first lied and then tried to sneak the money back into his cash register in an attempt to conceal his act. Holston’s actions violated State Personnel Board Work Rule 670-X-19-.01 (1)(a)(4) Failure to perform job properly and 670-X-19-.01(b)(3) Theft or unauthorized possession of company property. Holston’s dishonest conduct after being caught is also a violation of State Personnel Board Employee Work Rule 670-X-19-.01(1)(b)(13) Conduct unbecoming a

¹¹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

state employee. These rule violations also violate ABC's Employee Standards of Conduct and Store policies and procedures.

Wherefore Premises Considered, the undersigned recommends to the State Personnel Board that Holston's dismissal be UPHELD.

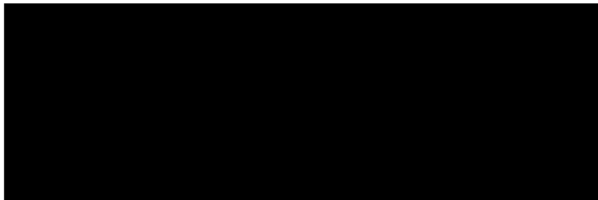
Done this the 19th day of November 2021.



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VIA EMAIL AND FIRST-CLASS U.S. MAIL

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